IN THE HIGH COURT OF DELHI

Crl.M.C.No.1757/2005

Shri Mohd. Ali Jabiullah ..... Petitioner
through: Mr.R.K.Handoo, Advocate

VERSUS

$ Shri A.K.Maurya & Ors. ..... Respondents
through: None.

RESERVED ON: 31.10.2007

% DATE OF DECISION: 05.11.2007

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y

2. To be referred to the Reporter or not? Y

3. Whether judgment should be reported in Digest? Y

: **PRADEEP NANDRAJOG, J.**

1. Shri A.K.Maurya, Inspector, Customs (Preventive) had filed a complaint against the petitioner herein under Section 135 (1) (b) of the Customs Act, 1962.

2. Taking cognizance of the complaint, the learned ACMM summoned the petitioner to face trial for an offence under Section 135 (1) (b) of the Customs Act, 1962.

3. Petitioner filed an application before the learned ACMM praying that the proceedings against him emanating out of the afore-noted complaint be dropped which application has been

dismissed by the learned ACMM vide order dated 15.3.2005.

4. In these circumstances, the petitioner has approached this Court under Section 482 of the Code of Criminal Procedure, 1973 seeking quashing of the complaint as also order dated 15.03.2005. However in view of the legal position that the learned ACMM cannot recall the order summoning an accused matter was heard with reference to whether in view of order dated 23.4.2003 passed by CEGAT setting aside the penalty levied vide order dated 29.6.2001, order of CEGAT having attained finality, was the complaint liable to be quashed.

5. The brief facts which emerge from the reading of the complaint are the following:-

(i) On 24.4.2000, the officers of the Customs (Preventive) conducted a search at the premises bearing No.T-7, (Ist Floor), DCM Road, Kishan Ganj, Delhi. At the time of the search, petitioner and one Mr.Mohd. Sohail were present in the said premises.

(ii) Upon search of the said premises, three zipper rexine carry bags were found containing 928 pieces of computer parts of foreign origin collectively valued at Rs.40,32,000/-. The officers conducting the search seized the said goods.

(iii) In the statement dated 24/25.4.2000 under Section 108 of the Customs Act, 1962, the petitioner admitted the

recovery,seizure and other incriminating facts. He stated that the seized goods were smuggled from Nepal. That he had engaged himself in the business of smuggling at the advice of one Mr.Hashim. That the smuggled goods used to be handed to him by the person working on behalf of Mr.Hashim and that he used to further deliver the goods as per the instructions of Hashim.

(iv) Thus, alleging that the petitioner knew or had reason to believe that he was dealing with the goods liable to be confiscated under Section 111 of the Customs Act 1962, the present complaint has been filed against the petitioner.

6. During pendency of the complaint, an adjudication order was passed by the Commissioner of Customs (General) on 29.6.2001 whereby the goods allegedly seized from the petitioner were confiscated and a personal penalty of Rs.10 lacs was imposed on him.

7. The petitioner challenged the said adjudication order by filing an appeal before the CEGAT. Vide order dated 23.4.2003, the CEGAT set aside the adjudication order and exonerated the petitioner. The findings of the CEGAT in so far as they are relevant for consideration in the present case are extracted below:-

> "3. We have heard both sides. From the record, we find that the impugned order has been passed by the Commissioner by taking into consideration

the two factors, firstly, the recovery of the goods (computer parts) bearing foreign marking such as Japan, and Korea and secondly, the alleged confessional statement of the appellant himself regarding the smuggled nature of the goods. But in our view, the learned Commissioner was wrongly influenced by these factors while passing the impugned order. The goods were seized from the residentail premises situated on the first floor, T-7, DCM Road, Kishan Ganj, Delhi. The appellant was admittedly at that time not the owner of the premises. There is nothing on the record to suggest if any attempt was made to ascertain the ownership of that premises. At the time of raid,besides the appellant, another person, Mohd. Sohail was also present in that very room from where the goods were seized. That being so, it could not be said that the seized goods were recovered from the possession of the appellant alone. Rather legally, the recovery was in fact effected from the joint possession of both of them. But strange enough, Mohd. Sohail had been let off, after simply recording his statement without holding any further enquiry about his nature of the possession of the premises. Even the nature of the possession of the appellant in the premises from where the goods were seized had not been enquired into. There is nothing on the record to suggest if the possession of the appellant of the premises was a tenant or licencee and under whom. The ownership of the premise as observed above, had not been ascertained during the course of investigation.

4. Apart from this, the seized goods (at that time) were not prohibited goods in terms of Section 123 of Chapter IVA of the Customs Act. They were freely marketable and available for sale and purchase in the market. The fact that the goods carried the name of foreign countries such as Japan and Korea was not sufficient to raise legal presumption about the smuggled character of the goods. The initial burden was on the Department to prove that the seized goods were smuggled into India. But in our view, this burden had not been discharged by the Department at all.

5. The alleged confessional statement of the

> appellant that one Hasim used to smuggle the goods from Nepal and sent to him at Delhi could not be taken to be the conclusive proof of the smuggled nature of the goods. This fact was rather required to be proved by positive and acceptable evidence by the Department which it had failed to prove. More over, the alleged confessional statement was retracted by the appellant when he was produced before the Court by alleging that the same was obtained from him under duress, and torture and as such, it did not carry much credence and value. No attempt was made to catch hold of Hasim. No evidence had been also collected to seek corroboration of the confessional statement of the appellant. The appellant in fact could not be said to have any positive personal knowledge about the smuggled nature of the goods as he never himself had gone to Nepal to bring the goods. He could not know the origin of the goods as he could hardly put his name in Hindi script as is evident from the panch-nama. Therefore, under these circumstances, no capital out of the alleged confessional statement of the appellant could be made by the Department in order to cover up its failure to prove the smuggled character of the seized goods, which as observed above, were otherwise freely available in the market for sale and purchase. In the light of the discussion made above, in our view, the impugned order of the Commissioner (Appeals) cannot be legally sustained and the same deserves to be set aside."

8. As noted above, in view of the order passed by CEGAT the petitioner filed an application for discharge. Noting the judgments of the Supreme Court in the decisions reported as *Asst. Collector of Customs Vs. L.R.Malwani* 1999 (110) ELT 317 (SC) and *Santram Paper Mills Vs. Collector of Central Excise* 1997 (96) ELT 19 (SC) and the judgment of the Andhra Pradesh High Court in the decision reported as *K.Neelakantha Rao Vs. State of Andhra Pradesh* 2000 (122) ELT 7, the ACMM

dismissed the said application vide order dated 17.3.2005 holding in para 5 as under :-

> "5. From the aforesaid authorities, it is clear that the finding of adjudicating authority is not binding on this court and that the prosecution in a criminal case is to be determined on its own merits as per law uninhibited by the finding of the Tribunal. Thus, the accused cannot be discharged only because of the reason that he has been exonerated in departmental proceedings."

9. In support of the petition, learned counsel for the petitioner contended that the reasons given by the ACMM that in all cases irrespective of exoneration in adjudication proceedings, the criminal proceedings would continue is not correct. That the judgment of the Andhra Pradesh High Court in Neelakantha's case (supra) which has formed the basis of the judgment of the ACMM has been disagreed to by a learned Single Judge of this court in the decision reported as *Sunil Gulati v R.K.Vohra* 2007 (1) JCC 220. That with the exoneration of the petitioner in adjudication proceedings, the foundation for continuing the prosecution in the criminal complaint no longer exists for the reason adjudication proceedings and criminal prosecution are based on same set of facts/allegations. Reliance was also placed upon under-noted judgements :-

(i) *P.S.Raja Vs. State of Bihar* 1996 SCC (Crl.) 897

(ii) *Surkhi Lal Vs. UOI* 2005 (85) DRJ 11

(iii) *Sadhna Jain Vs. P. Sudhir* 2004 (1) JCC 71

(iv) *S.K.Sinha Vs. S.K.Singal & Anr.* 1987 (30)ELT 900

10. On the other hand, learned counsel for the Customs Department who did not appear at the hearing but in the written submissions filed by him has urged that the mere fact that the petitioner has been exonerated in the departmental or adjudicatory proceedings will not entitle him to escape prosecution in criminal proceedings which are independently maintainable. Reliance was placed upon the following judgments :-

(i) *Asst. Collector of Customs Vs. L.R.Malwani* 1999 (110) ELT 317 (SC)

(ii) *Standard Chartered Bank & Ors. Vs. Directorate of Enforcement & Ors.* 2006 (1) JCC 488

(iii) *Santram Paper Mills Vs. Collector of Central Excise* 1997 (96) ELT 19 (SC)

11. I need not deal with the rival judgments cited for the reason taking note of the various judgments on the issue including the ones noted above and especially the judgment of the Supreme Court in the *Standard Chartered Bank's* case (supra), A.K.Sikri, J. of this court in Sunil Gupta's case (supra) has held as under :-

> “25.....In fact, various cases of the Supreme Court, note whereof is taken above, deal with different situations. The principles which can be culled out from the aforesaid judgments, when all these judgments are read out harmoniously, would be the following:
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> 1. On the same violation alleged against a

person, if adjudication proceedings as well as criminal proceedings are permissible, both can be initiated simultaneously. For initiating criminal proceedings one does not have to wait for the outcome of the adjudication proceedings as the two proceedings are independent in nature.

2. The findings in the departmental proceedings would not amount to res judicata and initiation of criminal proceedings in these circumstances can be treated as double jeopardy as they are not in the nature of "prosecution".

3. In case adjudication proceedings are decided against a person who is facing prosecution as well and the Tribunal has also upheld the findings of the adjudicators/assessing authority, that would have no bearing on the criminal proceedings and the criminal proceedings are to be determined on its own merits in accordance with law, uninhibited by the findings of the Tribunal. It is because of the reason that in so far as criminal action is concerned, it has to be proved as per the strict standards fixed for criminal cases before the criminal court by producing necessary evidence.

4. In case of converse situation namely where the accused persons are exonerated by the competent authorities/Tribunal in adjudication proceedings, one will have to see the reasons for such exoneration to determine whether these criminal proceedings could still continue. If the exoneration in departmental adjudication is on technical ground or by giving benefit of doubt and not on merits or the adjudication proceedings were on different facts, it would have no bearing on criminal proceedings. If, on the other hand, the exoneration in the adjudication proceedings is on merits and it is found that allegations are not substantiated at all and the concerned person(s) is/are innocent, and the criminal prosecution is also on the same

> set of facts and circumstances, the criminal prosecution cannot be allowed to continue. The reason is obvious criminal complaint is filed by the departmental authorities alleging violation/contravention of the provisions of the Act on the part of the accused persons. However, if the departmental authorities themselves, in adjudication proceedings, record a categorical and unambiguous finding that there is no such contravention of the provisions of the Act, it would be unjust for such departmental authorities to continue with the criminal complaint and say that there is sufficient evidence to foist the accused with criminal liability when it is stated in the departmental proceedings that ex-facie there is no such violation. The yardstick would, therefore, be to see as to whether charges in the departmental proceedings as well as criminal complaint are identical and the exoneration of the concerned person in the departmental proceedings is on merits holding that there is no contravention of the provisions of any act."

12. From a perusal of the Sunil Gupta's case (supra), it is apparent that a distinction has been drawn where exoneration in an adjudicating proceeding on a given set of facts and evidence is on merits vis-a-vis where exoneration in adjudicating proceeding is either not on merits or criminal proceeding is based upon different set of facts and evidence.

13. Therefore, to ascertain the effect of the exoneration in the adjudication proceedings on the criminal proceedings, in a given case it has to be seen whether :-

(i) The criminal prosecution is based on same set of

facts/allegations and evidence which was before the adjudicating authority or not; and

(ii) Whether exoneration by the adjudicating authority is on merits or not;

14. In the decision reported as *Kailash Chandra Vs. State of U.P.* 2005 (2) ESC 1158, the Allahabad High Court was considering the effect of acquittal in the criminal proceedings on the departmental/disciplinary enquiry pending against a delinquent employee. In the said context, an issue arose as to the nature of the acquittal in the criminal proceedings. After considering various judgments, the Court observed as under :-

> 27. "Thus in view of law laid down by apex court and other High Court there can be no hesitation to hold that if the Government employee/public servant has been punished departmentally on his misconduct earlier which is a foundation of criminal prosecution and later on criminal case ended in acquittal and if the acquittal is clean and honourable based on merit wherein accused has been completely exonerated from the offence alleged against him and the prosecution case found totally false with positive finding that the accused did not commit the offence in question and acquitted not on account of benefit of doubt or appreciation of evidence including lack of sufficient evidence or lack of sanction for prosecution or on any other technical grounds he may be reinstated back in service with other consequential benefit including arrears of salary or other pensionary benefit admissible to him if retired earlier by treating him in service but in other situation where the acquittal is based on benefit of doubt or appreciation of evidence including lack of sufficient

evidence or lack of sanction for prosecution or any other technical ground, disciplinary enquiry pending against such Government or public servant cannot be concluded, rather it would be appropriate that the departmental authority may continue with the disciplinary inquiry or hold fresh enquiry in respect of the mis-conduct, which was foundation of criminal case ended in acquittal against such Government servant. If disciplinary inquiry has already been concluded and major punishment, as envisaged under Article 311 of the Constitution of India or under the relevant service rules, has already been awarded to such Government servant, it would not be necessary and appropriate to re-open the same on account of his such acquittal from criminal charges.

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Thus in view of the discussions made herein before, the respondent Government of Uttar Pradesh is hereby restrained and directed not to apply G.O.No. 6/10/79-Karmic-1 Lucknow dated 12.10.1979, indiscriminately in whole-sale manner, irrespective of merit of individual case of acquittal of Government servant in criminal prosecution forthwith. The aforesaid G.O.is to be applied only in cases of clean and honourable acquittal based on merits, where competent court trying the offences (including higher court hearing the appeal or revision) has completely exonerated the accused from the offence by recording positive finding to the effect that the accused did not commit the offence and whole prosecution story against him thrown out and found false. The acquittal should not be based on extension of benefits of reasonable doubts including appreciation of evidence, lack of sufficient evidence or want of sanction for prosecution or other technical grounds.

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From the aforesaid finding recorded by this Court in criminal appeal filed by the petitioner, it is clear that petitioner has not been exonerated of the charges by recording any positive finding in criminal case to the effect that he did not commit

> the offence in question rather he has been acquitted by entertaining the benefit of doubt about the prosecution case as the prosecution has failed to establish the guilt beyond reasonable doubt as required under law. Therefore, it cannot be treated to be a honourable and clean acquittal on merits from the aforesaid criminal case and as such he cannot be held to be entitled for reinstatement in service with all consequential benefits of service. ……." (Emphasis supplied)

15. In the decisions reported as *Govind Chandra Sambhasingh Mohapatra Vs. Upendra Padhi & Anr.* Air 1960 Orissa 29, *State of Orissa Vs. Sailabehari Chatterjee* AIR 1963 Orissa 73 and *Doaraikannu Vs. General Manager, Parry Confectionary Ltd.* 1977 Lab I.C. 1471 (Madras High Court), it was held that an acquittal by way of giving benefit of doubt is not an acquittal on merits.

16. From the afore-noted judgments, the legal principle which can be culled out is that an "acquittal on merits" is an acquittal after trial on a consideration of the facts duly proved as per rules of evidence as distinguished from the acquittals occurring due to technical defects such as want of sanction, fact not proved as rule of evidence not followed, benefit of doubt etc. To put it differently, an acquittal is said to be on merits when it is based on a positive finding of innocence of the accused.

17. In the backdrop of the legal position, it has to be seen in the instant case whether exoneration of the petitioner by the adjudicating authority passes the test of exoneration on merits.

18. It is not in dispute that both the proceedings, i.e. criminal and adjudication are based upon the same set of facts/allegations.

19. A perusal of the order of the CEGAT shows that the petitioner was exonerated because of following reasons:-

(i) Department has not been able to establish the ownership of the searched premises.

(ii) The initial burden was on the department to prove the smuggled character of the goods and department failed to discharge the same.

(iii) Department failed to prove the alleged confessional statement of the petitioner under Section 108 of the Customs Act by leading positive and acceptable evidence.

20. Thus, in essence, the CEGAT exonerated the petitioner because of insufficiency of evidence and failure to prove the statement of the petitioner recorded under Section 108 of the Customs Act.

21. In the decision in *Sunil Gupta's* case (supra) where exoneration in adjudication proceedings was due to the fact that the prosecution failed to prove the alleged confessional statement of the accused recorded under the Section 108 of the Customs Act, the court refused to quash the complaint and also held that it would still be open to the criminal court to

decide whether the statement of accused under Section 108 of the Customs Act should be believed or not.

22. In the instant case for lack of evidence on 3 points, namely, proof of ownership of the searched premises, proof of smuggled character of the goods and proof of confessional statement of the petitioner recorded under Section 108 of the Customs Act, the petitioner was exonerated. Needless to state, at the criminal trial the prosecution would be entitled to prove by leading evidence the ownership of the searched premises, smuggled character of goods and in particular confessional statement of the petitioner recorded under Section 108 of the Customs Act.

23. In view of above discussion, the petition is devoid of any merits and is dismissed.

November 5, 2007 PRADEEP NANDRAJOG

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